

WC-03-227

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October 27, 2003

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VIA COURIER

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
Wireline Competition Bureau – CPD – 214 Apps.
P.O. Box 358145
Pittsburgh, PA 15251-5145

Re: Joint Application of 360networks (USA) inc. and Touch America, Inc.
(Debtor-in-Possession) for Domestic Section 214 Authority to Transfer Certain
Assets, Including Relevant Customer Base, of an Authorized Domestic Carrier


Dear Ms. Dortch:

On behalf of 360networks (USA) inc. (“360networks”) and Touch America, Inc. (Debtor-in-Possession) (“Touch America”), enclosed please find an original and six (6) copies of the application for domestic Section 214 authority to transfer certain of Touch America’s assets, including the relevant customer base, to 360networks.

Also enclosed is a completed Fee Remittance Form 159 and check in the amount of \$860.00, to the Federal Communications Commission, which satisfies the filing fee required for this Application under line 2.b of Section 1.1105 of the Commission’s rules. Please date-stamp the enclosed extra copy of this filing and return it in the envelope provided.

Please direct any questions regarding this filing to the undersigned.

Respectfully submitted,



Troy F. Tanner

Counsel for 360networks (USA) inc.

Ms. Marlene H. Dortch, Secretary
October 27, 2003
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Enclosures

cc via e-mail:

Jeffrey Carlisle (WCB)
William Dever (WCB)
Julie Veach (WCB)
Michael Meldahl (Touch America)
Jonathan S. Marashlian (Helein Law Group)
Lin Gentemann (360networks)

READ INSTRUCTIONS CAREFULLY
BEFORE PROCEEDING

FEDERAL COMMUNICATIONS COMMISSION
REMITTANCE ADVICE

Approved by OMB
3060-0589
Page No. of

(1) LOCK BOX # 358145		FCC USE ONLY	
SECTION A - PAYER INFORMATION			
(2) PAYER NAME (if paying by credit card enter name exactly as it appears on the card) Swidler Berlin Shereff Friedman LLP		(3) TOTAL AMOUNT PAID (U.S. Dollars and cents) 860.00	
(4) STREET ADDRESS LINE NO. 1 3000 K Street, NW			
(5) STREET ADDRESS LINE NO. 2 Suite 300			
(6) CITY Washington		(7) STATE DC	(8) ZIP CODE 20007
(9) DAYTIME TELEPHONE NUMBER (include area code) (202) 295-8360		(10) COUNTRY CODE (if not in U.S.A.)	
FCC REGISTRATION NUMBER (FRN) REQUIRED			
(11) PAYER (FRN) 0004-3539-00		FCC USE ONLY	
IF MORE THAN ONE APPLICANT, USE CONTINUATION SHEETS (FORM 159-C) COMPLETE SECTION BELOW FOR EACH SERVICE, IF MORE BOXES ARE NEEDED, USE CONTINUATION SHEET			
(13) APPLICANT NAME 360networks (USA) inc.			
(14) STREET ADDRESS LINE NO. 1 867 Coal Creek Circle			
(15) STREET ADDRESS LINE NO. 2 Suite 160			
(16) CITY Louisville		(17) STATE CO	(18) ZIP CODE 80027
(19) DAYTIME TELEPHONE NUMBER (include area code) 303-854-5000		(20) COUNTRY CODE (if not in U.S.A.)	
FCC REGISTRATION NUMBER (FRN) REQUIRED			
(21) APPLICANT (FRN) 0006213185		FCC USE ONLY	
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(23A) CALL SIGN/OTHER ID	(24A) PAYMENT TYPE CODE CUT	(25A) QUANTITY 1	
(26A) FEE DUE FOR (PTC) \$860.00	(27A) TOTAL FEE \$860.00	FCC USE ONLY	
(28A) FCC CODE 1		(29A) FCC CODE 2	
(23B) CALL SIGN/OTHER ID	(24B) PAYMENT TYPE CODE	(25B) QUANTITY	
(26B) FEE DUE FOR (PTC)	(27B) TOTAL FEE	FCC USE ONLY	
(28B) FCC CODE 1		(29B) FCC CODE 2	
SECTION D - CERTIFICATION			
CERTIFICATION STATEMENT I, <u>JOHN F. TANNER</u> , certify under penalty of perjury that the foregoing and supporting information is true and correct to the best of my knowledge, information and belief.			
SIGNATURE <u>John F. Tanner</u>		DATE <u>10/27/03</u>	
SECTION E - CREDIT CARD PAYMENT INFORMATION			
MASTERCARD _____ VISA _____ AMEX _____ DISCOVER _____			
ACCOUNT NUMBER _____		EXPIRATION DATE _____	
I hereby authorize the FCC to charge my credit card for the service(s)/authorization herein described.			
SIGNATURE _____		DATE _____	

SEE PUBLIC BURDEN ON REVERSE

FCC FORM 159

FEBRUARY 2003(REVISED)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of the Joint Application of

360NETWORKS (USA) INC.

and

TOUCH AMERICA, INC. (Debtor-in-Possession)

For Authority Pursuant to Section 214 of the
Communications Act of 1934, as Amended, to Transfer
Certain Assets, Including Relevant Customer Base, of
An Authorized Domestic Carrier

WB Docket No. 03-_____

APPLICATION

360networks (USA) inc. ("360networks" or "Transferee") and Touch America, Inc. (Debtor-in-Possession) ("Touch America" or "Transferor") (together "Applicants"), through their undersigned counsel and pursuant to Section 214 of the Communications Act of 1934, as amended,¹ and Section 63.04(a) of the Commission's rules,² hereby request Section 214 authority to enable 360networks to acquire certain of Touch America's assets, as described in this application. The proposed transaction will not result in a loss or impairment of service to the Touch America customers that would be affected by consummation of the proposed transaction. This application is therefore being filed as a transfer of control application pursuant to Section

¹ 47 U.S.C. § 214 (the "Act").

² 47 C.F.R. § 63.04(a).

63.04 of the Commission's rules.³ As described below, Touch America is currently operating under the protection of Chapter 11 of the U.S. Bankruptcy Code.⁴

I. SUMMARY OF THE PROPOSED ASSET TRANSACTION

On June 19, 2003, Touch America Holdings, Inc. ("TA Holdings") and certain of its subsidiaries, including Touch America (collectively, "Touch Debtors"), filed voluntary petitions under Chapter 11 of the U.S. Bankruptcy Code to reorganize their business and financial structure ("TA Chapter 11 Proceedings").⁵ On June 19, 2003, 360networks' indirect corporate parent, 360networks Corporation, and TA Holdings and certain of its subsidiaries, including Touch America, entered into an Asset Purchase Agreement ("June Agreement"), wherein Touch America agreed to sell and 360networks agreed to acquire substantially all of the assets and customer base comprising Touch America's existing private line and dedicated Internet businesses, and several microwave and LMDS facilities; provided that, among other things, 360networks Corporation prevail as the successful bidder for such assets in the Touch Debtors' auction, and the Bankruptcy Court approve such sale to 360networks Corporation. Applicants initially sought approval for the transaction set forth in the June Agreement in filings submitted on June 26, 2003, and July 18, 2003.

In connection with the TA Chapter 11 Proceedings, on August 6-7, 2003, the Touch Debtors conducted an auction of certain of its assets, and at a subsequent hearing held on August 8, 2003, the Bankruptcy Court determined that 360networks Corporation was the successful bidder for such assets.⁶ On September 10, 2003, 360networks Corporation and TA Holdings and

³ *Id.*

⁴ *See Chapter 11 Case No. 03-11915-MFW et al. (Bankr. D. Del.).*

⁵ *Id.*

⁶ As part of the auction process, 360networks Corporation also acquired the right to purchase the dial-up Internet business of Touch Debtors.

certain of its subsidiaries, including Touch America entered into an Amended and Restated Asset Purchase Agreement, incorporating changes to the transaction resulting from the August auction ("September Agreement"). On September 10, 2003, the Bankruptcy Court entered an order approving the sale of certain assets to 360networks Corporation pursuant to the September Agreement. Subsequently, 360networks Corporation has determined that it will not acquire Touch America's microwave and LMDS assets. Further, 360networks Corporation is negotiating with the Touch Debtors to acquire Touch America's ATM/Frame Relay business. This ATM/Frame Relay transaction remains subject to, among other things, the approval of the Bankruptcy Court and other required regulatory approvals.⁷ Because of the substantial changes to the transaction, Applicants withdrew their initial domestic Section 214 and wireless transfer of control applications on October 27, 2003. The subject application is now being filed to reflect the terms of the new transaction, and Applicants respectfully request expedited approval.

Applicants emphasize that the transition of Touch America's private line, dedicated and dial-up Internet, and ATM/Frame Relay businesses to 360networks will be seamless and virtually transparent to the Touch America customer base that 360networks will acquire. Following the transfer of assets, 360networks will continue to provide the same services to those Touch America customers, under the same rates and terms and conditions of service as those customers currently receive from Touch America.

In accordance with applicable requirements, Applicants have sent written notice to affected customers of Touch America informing them of the proposed transaction. Service to these

⁷ The transactions, as revised by the September Agreement and subsequent negotiations, contemplate the transfer of substantially all of the assets associated with Touch America's existing private line, dedicated and dial-up Internet, and ATM/Frame Relay businesses, including customer accounts, certain fiber leases, network equipment, and co-location facilities. Touch America currently provides private line, dedicated and dial-up Internet, and ATM/Frame Relay services to customers located in 15 states: Arizona, California, Colorado, Idaho, Illinois, Minnesota, Montana, Nevada, New Mexico, North Dakota, Oregon, Texas, Utah, Washington and Wyoming.

customers will not be transferred until the requisite approvals have been obtained. In addition, 360networks will file with the Commission the notice and certification required by Section 64.1120(e) of the Commission's rules. Applicants seek to complete the proposed transaction on an expedited basis so that 360networks can integrate the acquired operations into its existing business and thereby expand and improve its ability to offer a diverse range of broadband network and infrastructure services to these market segments.

II. REQUEST FOR EXPEDITED CONSIDERATION

In light of the current bankrupt status of Touch America, the transaction proposed herein is necessary to ensure that the Touch America customer base that 360networks will acquire will continue to receive uninterrupted service. Due to its uncertain financial position, Touch America is vulnerable to erosion of its existing customer base. Touch America also is presently unable to compete effectively for new customers as a result of its capital constraints and the uncertainty of its current financial position. Rapid completion of the transaction therefore is a critical factor in order to minimize the risk of interruption of service or other inconvenience to affected Touch America customers. Accordingly, Applicants respectfully request that the Commission expedite the processing of this Application and grant the requested authority to permit Applicants to consummate the transaction as soon as possible following approval by the Bankruptcy Court of the proposed transaction as recently amended. If, however, the Bankruptcy Court permits a carrier other than 360networks to acquire the ATM/Frame Relay assets of Touch America, Applicants will promptly notify the Commission of such change in circumstance and amend this Application accordingly.

III. INFORMATION REQUIRED BY SECTION 63.04

Applicants submit the following information in support of their request for Section 214 authority pursuant to Section 63.04 of the Commission's rules.

(a) Name, Address and Telephone Number of Each Applicant

Transferor: Touch America, Inc. (Debtor-in-Possession) ("Touch America")
130 North Main Street
Butte, MT 59701-9331
(406) 497-5100
FRN: 0005806468

Transferee: 360networks (USA) inc. ("360networks")
867 Coal Creek Circle, Suite 160
Louisville, Colorado 80027
(303) 854-5000
FRN: 0006213185

(b) State of Organization

Transferor: Touch America is organized under the laws of the State of Montana.

Transferee: 360networks is organized under the laws of the State of Nevada.

(c) Contact persons for this Application

Questions or inquiries concerning this Application may be directed to:

For 360networks:

Jean L. Kiddoo
Troy F. Tanner
Grace R. Chiu
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-5116
(202) 295-8360 (Tel)
(202) 424-7645 (Fax)
Email: JLKiddoo@swidlaw.com
TFTanner@swidlaw.com
GRChiu@swidlaw.com

For Touch America:

Jonathan S. Marashlian
The Helein Law Group, P.C.
8180 Greensboro Drive, Suite 700
McLean, Virginia 22102
(703) 714-1313 (Tel)
(703) 714-1330 (Fax)
Email: jsm@thlglaw.com

- (d) Equity Ownership. 360networks is a U.S. owned and controlled carrier with operations throughout the United States. Although the corporate parent of 360networks, 360networks Corporation, is organized under the federal laws of Canada, it is managed and controlled by U.S. citizens at the shareholder, board of directors and management levels. 360networks Corporation's stock is widely held, and more than 50% of it is owned and controlled by U.S. interests. The largest shareholder of 360networks Corporation is JP Morgan Chase, a leading global financial services firm whose stock is widely held, which holds 14%. The second largest shareholder of 360networks Corporation holds 11% and is a leading private equity investment fund controlled by a U.S. citizen, Wilbur L. Ross, Jr. No other person or entities directly or indirectly owns ten percent (10%) or more of the equity or voting interests of 360networks Corporation. Other significant shareholders include funds controlled by American Express, Bear Stearns and Citigroup. The exact ownership of 360networks is as detailed below.

The following entity directly owns ten percent (10%) or more of the equity of **360networks**.

Name: 360networks holdings (USA) inc.
867 Coal Creek Circle, Suite 160
Louisville, Colorado 80027
Citizenship: U.S.
Principal Business: Telecommunications
% Equity: 100%

The following entity directly owns ten percent (10%) or more of the equity of **360networks holdings (USA) inc.**

Name: 360networks Corporation
Address: #1500-1066 West Hastings Street
Vancouver, British Columbia
V6E 3X1
Citizenship: Canada
Principal Business: Telecommunications
% Equity: 100%⁸

⁸ 360networks Corporation directly owns 82% of the equity of 360networks holdings (USA) inc. and indirectly owns the remaining 18% through its wholly-owned Canadian subsidiary, 360networks (CDN fiber) ltd.

The following entities directly own ten percent (10%) or more of the equity of **360networks Corporation**.

Name: J.P. Morgan Chase & Co.
Address: 270 Park Avenue
New York, New York 10017
Citizenship: U.S.
Principal Business: Financial Services
% Equity: 14%⁹

Name: WLR Recovery Fund II, L.P.
Address: c/o WL Ross & Co. LLC
Manhattan Tower
101 East 52nd Street, 19th Floor
New York, New York 10022.
Citizenship: U.S.
Principal Business: Investment
% Equity: 11%

The general partner of **WLR Recovery Fund II, L.P.** is:

Name: WLR Recovery Associates II, LLC
Address: c/o WL Ross & Co. LLC
Manhattan Tower
101 East 52nd Street, 19th Floor
New York, New York 10022.
Citizenship: U.S.
Principal Business: Investment

No other person or entities directly or indirectly owns ten percent (10%) or more of the equity or voting interests of **360networks Corporation**.

- (e) Certification. 360networks and Touch America each certify pursuant to Sections 1.2001 through 1.2003 of the Commission's rules that no party to the application is subject to a denial of Federal benefits pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 3301.
- (f) Description of the transaction. Please see Section I of this Application.
- (g) Geographic description of areas served. Touch America currently provides private line, dedicated and dial-up Internet, and ATM/Frame Relay services to customers located in 15 states: Arizona, California, Colorado, Idaho, Illinois, Minnesota, Montana, Nevada, New Mexico, North Dakota, Oregon, Texas, Utah, Washington

⁹ J.P. Morgan Chase & Co. indirectly owns approximately 14% of the equity of 360networks Corporation through its wholly-owned subsidiaries, J.P. Morgan Chase Bank and J.P. Morgan Securities, Inc., which directly hold approximately 11.5% and 2.5%, respectively.

and Wyoming. The addition of the Touch America network supporting its private line, dedicated and dial-up Internet, and ATM/Frame Relay businesses complements 360networks' existing optical mesh fiber network, which spans 29,000 route miles, reaches 69 major cities in the U.S. and Canada, and includes 13 metro fiber networks in the largest U.S. cities and 23 metro fiber networks in nine Canadian provinces.

360networks currently provides telecommunications services and network infrastructure to more than 13,000 carrier and enterprise customers. 360networks offers a comprehensive range of services including traditional local and long distance voice products, Internet, transport and LAN/WAN connectivity.

- (h) Streamlined Treatment. Applicants submit that the proposed transaction would result in 360networks having a market share in the interstate, interexchange market of substantially less than 10 percent, and 360networks would provide competitive telephone exchange services or exchange access services (if at all) exclusively in geographic areas served by a dominant local exchange carrier that is not a party to the transaction. Further, neither Applicant is dominant with respect to any service, and no radio licenses will be assigned to 360networks or any of its affiliates as part of this transaction. Accordingly, this Application presumptively qualifies for streamlined processing pursuant to Section 63.03(b)(2)(i) of the Commission's rules.¹⁰
- (i) Related FCC Applications. There are no other FCC applications associated with this transaction.
- (j) Special Consideration. As noted previously, 360networks proposes to acquire the private line, dedicated and dial-up Internet, and ATM/Frame Relay businesses of Touch America, a company that is currently in bankruptcy. Applicants request expeditious processing of this Application to permit the proposed transaction to be completed as soon as possible, and with respect to the ATM/Frame Relay business, as soon as possible following approval of the proposed transaction by the Bankruptcy Court. Permitting Applicants to complete the proposed transaction at the earliest possible opportunity will minimize the risk of interruption of service or other inconvenience to affected Touch America customers.
- (k) Waiver Requests. Applicants have not filed any waiver requests in conjunction with the proposed transaction.
- (l) Public Interest Considerations. The proposed transaction will serve the public interest by avoiding any interruption of service and inconvenience to affected Touch America customers. By providing stability to those private line, dedicated and dial-up Internet, and ATM/Frame Relay customers, the proposed transaction will ensure that those customers continue to enjoy superior broadband services

¹⁰ 47 C.F.R. § 63.03(b)(2)(i).

backed by exceptional support services. Given that 360networks will provide these services on the same rates, terms and conditions of service that these customers currently receive from Touch America, the transaction will be virtually transparent to customers in terms of the services they receive. Moreover, as explained above, Applicants have provided written notice of the proposed transaction to assure that affected Touch America customers will understand how the proposed change in service provider will affect them.

Applicants note that Touch America's financial position at this stage precludes it from effectively competing for new customers and renders it vulnerable to erosion of its existing customer base. The proposed transaction, however, will help to offset these impacts by enabling 360networks to expand its private line, dedicated and dial-up Internet and ATM/Frame Relay customer base and network, thereby enhancing its presence in the market as a competitive provider of broadband communications services. Accordingly, Applicants respectfully submit that the proposed transaction will serve the public interest.

IV. CONCLUSION

For the reasons stated above, Applicants respectfully submit that the public interest, convenience, and necessity would be furthered by a grant of this Application. This Application is contingent on the closing of the transaction as reported herein. If the closing does not occur, Applicants will promptly notify the Commission.

Respectfully submitted,

By: 

Jonathan S. Marshlian
THE HELEIN LAW GROUP, P.C.
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(703) 714-1313 (Tel)
(703) 714-1330 (Fax)

Counsel to Touch America, Inc.
(Debtor-in-Possession)

By: 

Jean L. Kiddoo
Troy F. Tanner
Grace R. Chiu
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Washington, D.C. 20007-5116
(202) 295-8360 (Tel)
(202) 424-7645 (Fax)


Counsel to 360networks (USA) inc.

Dated: October 27, 2003.

**Certification of
360networks (USA) inc.**

CERTIFICATION

I, Lin Gentemann, General Counsel of 360networks Corporation, hereby certify that I am authorized to make this Certification on behalf of Transferee in the foregoing application, that the information in the foregoing application as it pertains to 360networks and Transferee is true and accurate to the best of my knowledge, and that neither 360networks Corporation nor Transferee is subject to a denial of Federal benefits pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 853(a), as amended.



Lin Gentemann

Date: October 23, , 2003

**Certification of
Touch America, Inc.
(Debtor-in-Possession)**

CERTIFICATION

I, Michael J. Meldahl, President of Touch America, Inc. (Debtor-in-Possession) ("Touch America"), hereby certify that the information in the attached application as it pertains to Touch America is true and accurate to the best of my knowledge and that Touch America is not subject to a denial of Federal benefits pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 853(a), as amended.



Date: October 27, 2003
